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IN THE

Supreme Court of the United States

October Term, 1955

No. 574

WILLIAM E. WARD,
Petitioner

vs.

CHARLES S. THOMAS, Secretary of the Department of the Navy,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Subject Index

	PAGE
STATUTORY PROVISION AS TO JURISDICTION	2
GROUNDS ON WHICH JURISDICTION IS INVOKED	2
QUESTIONS PRESENTED FOR REVIEW	3
STATUTES INVOLVED	3
STATEMENT OF CASE	4
REASONS FOR GRANTING THE WRIT	7

Appendix

Judgment of United States Court of Appeals for District of Columbia Circuit, entered on August 18, 1955, reversing Judgment of United States District Court 15

Order denying Petition for Rehearing In Banc, entered on September 23, 1955 23

Judgment on Mandate in previous case of Ward v. Anderson, entered on April 30, 1954 24

Order of United States District Court restoring William E. Ward to classified civil service, entered on July 12, 1954 25

Notification of Personnel Action, notifying William E. Ward as to "Reason for Removal" from office 27

List of Authorities Cited

Henrietta Mining Co., etc. v. Gardner, 173 U.S. 123 13

U. S. v. Tynen, 11 Wall. 88 13

Ward v. Anderson, 93 U.S. App. D.C. 156, 208 F(2nd) 48 ..... 1, 2, 8, 10

Title 28, Section 1254 of U.S.C. 2

Section 6 of Act of September 30, 1950, referred to as the Performance Rating Act of 1950, 5 U.S.C. § 2005 2,3,4,5,7,8,9,10,11,12,13

PAGE

Section 14 of Act of September 30, 1950, etc. 4, 13

Lloyd-LaFollette Act of August 24, 1912, 5 U.S.C. 652 ..... 8, 9, 10, 11, 13

Navy Civilian Personnel Instructions (N.C.P.I.) 45, 2-3c(2) and 45.5-3Bc 5

Navy Civilian Personnel Instructions (N.C.P.I.) Sections f(1) and f(2) 6

Navy Civilian Personnel Instructions (N.C.P.I.) Section 5-1(b) 11, 12

House Report No. 2277, 83rd Congress, 2nd Session 8, 9

Administrative Report of Department of the Navy 10, 11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

William E. Ward, petitioner herein, respectfully prays that a Writ of Certiorari be issued by this Honorable Court to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on August 18, 1955, (Appendix, p. 15), reversing the Judgment of the United States District Court for the District of Columbia, and the Order entered on September 23, 1955, (Appendix, p. 23), denying Petition for Rehearing In Banc.

The Judgment of the United States District Court, which was reversed, directed the restoration to classified civil service of William E. Ward, who was summarily removed from his government position because of "unsatisfactory service".

In a previous case, entitled Ward v. Anderson, (Anderson having preceded Thomas as Secretary of the Navy),

93 U.S. App. D.C. 156, 208 F (2nd) 48, the United States Court of Appeals for the District of Columbia Circuit reversed the lower Court, remanding the case for a further report from the administrative agency as to the applicability of the removal provision of the Act of September 30, 1950, referred to as the Performance Rating Act of 1950, 5 U.S.C. § 2005.

The Judgment on the Mandate in the previous case of Ward v. Anderson, was entered on April 30, 1954 (Appendix, p. 24), and the Order of the United States District Court restoring Ward to classified civil service was entered on July 12, 1954, (Appendix, p. 25) after the filing of a report by the administrative agency as to the applicability of the provisions of 5 U.S.C. § 2005, pursuant to said Judgment on Mandate.

The appellant in the present case thereupon took an appeal from the Order restoring petitioner to the classified civil service, as aforesaid.

STATUTORY PROVISION AS TO JURISDICTION

The case is within the jurisdiction of this Court under Title 28, Section 1254 of the U.S.C., the United States Court of Appeals for the District of Columbia Circuit, being the Court of highest jurisdiction in the District of Columbia.

GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction to review the Judgment herein by Writ of Certiorari, for the following special and important reasons:

1. The United States Court of Appeals for the District of Columbia Circuit has decided an import-

ant question of federal law which has not been, but which should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia Circuit has decided a federal question of substance not heretofore determined by this Court.

3. The case is of grave and vital importance to approximately 2,500,000 officers and employees of the federal government in the classified service.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Whether a federal employee in the classified civil service may be removed from his position for "unsatisfactory service" (in the face of a work performance rating of "satisfactory"), prior to being given a 90 day warning as prescribed in Section 6 of the Act of September 30, 1950, 5 U.S.C. § 2005.

2. Whether the provisions in Section 6 of the Act of September 30, 1950, 5 U.S.C. § 2005, with respect to the removal from classified civil service of a federal employee for "unsatisfactory service", may be totally disregarded in cases where removal is sought because of "unsatisfactory service".

3. Whether a federal employee in the classified civil service may be removed from his position for "unsatisfactory service" in the face of a performance rating of "satisfactory".

STATUTES INVOLVED

Section 6 of the Act of September 30, 1950, referred to as the Performance Rating Act of 1950, 5 U.S.C. § 2005, provides as follows:

"Each performance-rating plan shall provide for rating representing at least (1) satisfactory performance, corresponding to an efficiency rating of 'good' under the Veterans' Preference Act of 1944, as amended, and under laws superseded by this chapter; (2) *unsatisfactory performance which shall serve as a basis for removal* from the position in which such unsatisfactory performance was rendered; and (3) outstanding performance which shall be accorded only when all aspects of performance not only exceed normal requirements but are outstanding and deserve special commendation. *No officer or employee shall be rated unsatisfactory without a ninety-day prior warning* and a reasonable opportunity to demonstrate satisfactory performance." (Italics inserted)

Section 14 of said Act of September 30, 1950, provides as follows:

"All laws or parts of laws inconsistent herewith are hereby repealed to the extent of such inconsistency."

STATEMENT OF CASE

The petitioner was summarily removed from office on May 7, 1951, on the ground of "unsatisfactory service", without any previous warning or intimation that his removal was sought because of "unsatisfactory service". It is apparent from the record that his summary removal resulted from the personal antagonism of his superior officer, and that petitioner was relieved of his duties through a "swifty removal" in total disregard of the removal provision of the Performance Rating Act of 1950, 5 U.S.C. § 2005, rather than in compliance with the law.

At the time of his removal he held the position of Personnel Officer at the Marine Corps Air Station, Cherry Point, North Carolina, serving as Employment Officer and as Recorder of the Board of Civil Service Examiners, and charged with the duty of employing civilian personnel in accordance with the Civil Service laws and regulations.

He came to Cherry Point Station on April 24, 1942, by transfer and promotion, from the Office of the Labor Board, Naval Gun Factory, at Washington, D. C., at which time the Cherry Point Station had not yet been "commissioned" or accepted by the government from the contractors, and its operation had not begun. He organized the Employment Office, of which he was the head, and the employment of all civilian personnel at Cherry Point was under his jurisdiction.

His services prior to May 7, 1951, had always been considered as *"satisfactory"* and beyond reproach. There had been neither criticism nor complaint in regard thereto. In fact, his "performance rating", under the provisions of the Act of September 30, 1950, as of March, 1951 (and which actually was delivered to him in April, 1951), was given as "satisfactory".

However, on May 7, 1951, as above stated, without previous warning or any intimation whatsoever, petitioner was *summarily relieved of duty, and put out of his office.* On May 11, 1951, he was formally advised by letter that his employment had been terminated on the ground of *"unsatisfactory service"*.

The details on which the general charge of "unsatisfactory service" was based in the letter of May 11, 1951, were general in their nature and failed to meet the particularity required by the Navy Civilian Personnel Instructions 45, 2-3c(2) and 45.5-3Bc.

They did, however, inform petitioner that his services were being terminated on the ground of *"unsatisfactory service"*. On May 31, 1951, an attempt was made to amplify the items evidencing "unsatisfactory service". In this letter, too, petitioner was advised, "your removal from employment was proposed because of *"unsatisfactory service"*.

And finally, the petitioner received a formal "Notification of Personnel Action" (Appendix, p. 27), wherein he was notified that the "Reason for Removal" from office was on account of *"unsatisfactory service"*, although three lines below, in definite contradiction thereof, his performance rating was given as "satisfactory".

No other ground, whatsoever, was at any time given petitioner for the "Reason for Removal".

In other words, he was not removed because of disloyalty, or as a security risk, or for corruption, or for other misconduct or for any reason other than for *"unsatisfactory service"*.

Nor was his summary removal an "unusual" case, nor an "emergency" case, as defined in the Navy Civilian Personnel Instructions (N.C.P.I.), in effect at the time, sections f(1) and f(2) providing as follows:

> "(1) In *unusual* cases where the retention of the employee in an active duty status in his position during the notice period may result in damage to government property, would be otherwise detrimental to the interest of the government or would be injurious to the employee, his fellow workers, or the general public, the employee may be taken off his job. In such cases, if the employee cannot during such period be temporarily assigned to duties in which these conditions would not exist, he shall be placed on annual or sick leave as appropriate, if available, and otherwise on leave without pay if the employee so consents, for such time during the notice period as the circumstances warrant. The reasonableness of such exceptions in the cases of veterans will be considered where such employees appeal from final adverse decisions.
>
> (2) In *emergency* cases requiring suspension (not to exceed 30 days) during the notice period, the provisions of N.C.P.I. 45.2-8a will be followed." (Italics inserted)

The fact that petitioner was *summarily removed,* in an *arbitrary* and apparently malicious manner, is thus emphasized.

Congress intended, through the enactment of the removal provision in the Act of September 30, 1950, that government employees should be protected against "arbitrary, capricious or unjust discharge" where their work performance was involved. Such protection was urged by representatives of the American Federation of Government Employees, the National Federation of Government Employees, Government Employees' Council, and the American Federation of Labor, at the hearings that resulted in the enactment of the removal provision in the Performance Rating Act of 1950.

In the Opinion below (Appendix, p. 15), an erroneous statement is made that petitioner "was removed from his office pursuant to charges brought against him under the provisions of the Lloyd-LaFollette Act". It then refers to various "charges" which are in fact, factors upon which an employee's work performance is based,—that is whether "satisfactory" or "unsatisfactory". As above stated, petitioner was removed because of "unsatisfactory service" or "unsatisfactory work performance", and for no other reason, and he was not informed that he was removed under the provisions of the Lloyd-LaFollette Act or any other Act. His removal unquestionably was illegal and in contravention of the law.

REASONS FOR GRANTING THE WRIT

The issues presented by this case raise questions of fundamental importance to the Government of the United States and approximately 2,500,000 federal employees.

The decision below deprives federal employees of procedural safeguards in the matter of removal from office,

which were intended through the enactment of the Act of September 30, 1950.

The issues which this Honorable Court is asked to decide, for the first time, are based on certain provisions contained in the Act of September 30, 1950, whereunder Congress sought to safeguard the removal of federal employees for "unsatisfactory services".

In the case of Ward v. Anderson, 93 U.S. App. D.C. 156, 208 F. (2nd) 48, the Court stated:

> *"The issue raised for the first time* in the District Court *involved a substantial question of law*—construction of a statute which appears to require disciplining officials to follow certain specific procedural directions." (Italics inserted)

As recently as July 19, 1954, the Subcommittee on the Federal Civil Service of the Committee on Post Office and Civil Service of the House of Representatives, submitted a report (House Report No. 2277, 83rd Congress, 2nd Session), wherein it emphasized the importance of protecting the procedural safeguards in the matter of removal from office of federal employees where "job performance is primarily concerned".

In this report, on pages 10 and 11, it is stated:

> "While the subcommittee recognizes that there are a number of improper actions which still can be covered by the Lloyd-LaFollette Act, it feels that where *job performance* is primarily concerned, the provisions of the Performance Rating Act of 1950 should prevail. (Italics inserted)
>
> This feeling recently has been substantiated by a United States Court of Appeals decision in the case of Ward v. Anderson (208 F 2d 48). Ward, a Department of the Navy employee, had just received a 'satisfactory' performance rating a short time prior to being given a letter of charges and discharged because his work was deficient in certain respects.

The United States Court of Appeals, in remanding this case to the district court, indicated that where work performance was concerned, it appeared that the provisions of the Performance Rating Act of 1950, and not the Lloyd-LaFollette Act of 1912, should apply.

The subcommittee is firmly convinced that this safeguard provision in section 6 of the Performance Rating Act of 1950 is highly desirable and should be retained. . . ."

"To those departments and agencies desiring to discharge substandard employees, the subcommittee reminds them that they should scrutinize performance meticulously during probationary periods, because this is the time when poorly qualified workers can be easily separated and properly should be. Once employees complete their probation and acquire civil-service status, they also rightfully acquire certain appeal rights from adverse personnel actions including separations for unsatisfactory performance. Such rights are predicated on the theory that they have proven their ability by having successfully completed their trial period in Government and accordingly, the burden to prove to the contrary rests now on the agency, whereas during probation it was on the employee.

It is not the desire of the subcommittee that this section of its report be misconstrued by the departments and agencies. The subcommittee is not condemning the use of the provisions of either the Lloyd-LaFollette Act or section 14 of the Veterans' Preference Act to discharge undesirable workers. Furthermore, it recognizes the necessity for just such an administrative authority as these acts provide. What the subcommittee is interested in, rather, is making certain that career employees are given every consideration to which they are rightfully entitled.

Where they are not performing up to standard, the subcommittee wants them to be so informed, along with suggestions and assistance on how to elevate the quality of their work to where it will meet the

job requirements. THE PROVISIONS OF SECTION 6 OF THE PERFORMANCE RATING ACT OF 1950 REQUIRE THAT THIS BE DONE, AND ALSO PROVIDE FOR A 90-DAY WARNING NOTICE. IT IS THIS SAFEGUARD THAT THE SUBCOMMITTEE DOES NOT WANT TO SEE SUBVERTED BY ADMINISTRATIVE MISUSE OF OTHER STATUTES." (Capital letters inserted)

The report further sets out on page 17:

"The subcommittee believes that the present safeguard provisions of section 6 of the Performance Rating Act of 1950 relating to the 'unsatisfactory' rating, namely, that employees be given a 90-day advance warning and a reasonable time in which to demonstrate improved performance, before the adverse 'unsatisfactory rating is given him, are protective rights which career employees are justly entitled. FURTHERMORE, AGENCIES SHOULD NOT SUBVERT THESE RIGHTS WHICH CONGRESS HAS GRANTED TO FEDERAL CAREER WORKERS THROUGH THE MISUSE OF OTHER LAWS OR ADMINISTRATIVE REGULATIONS GOVERNING PERSONNEL." (Capital letters inserted)

In the administrative report by the Department of the Navy, submitted pursuant to the court mandate in Ward v. Anderson (93 U.S. App. D.C. 156, 208 F. 2nd 48), the Department of the Navy, for the first time, referred to the Act of August 24, 1912, the Lloyd-LaFollette Act (5 U.S.C. 652), as the Act applicable in the removal of petitioner, and erroneously read into the Act of September 30, 1950, an interpretation which nowheres appears in the latter Act. The administrative agency, in its report, *erroneously* and *improperly* made the following observation:

"The Performance Rating Act of 1950, section 6 (5 U.S.C. 2005) was not the appropriate law to invoke, nor is it applicable, because this Act was intended to be applied to an employee whom the department be-

lieves will improve his work performance or whose experience and services can be utilized by reassignment to another position. In other words, the Performance Rating Act should be applied when the agency or department contemplates continued employment of the individual rather than his immediate removal as soon as the procedures of the applicable removal laws (5 U.S.C. 652, id. 863) shall have been complied with."

If this interpretation were the intention of Congress, Congress would have so provided in the law. But it did not so provide.

There is nothing in the Act of September 30, 1950, suggesting that the removal provision therein applies *only* "when the agency or department contemplates continued employment of the individual rather than his immediate removal."

In fact, this contention is specifically refuted by the removal provision for unsatisfactory work performance under the "Performance Rating Plan" ordered by the Department of the Navy, itself, on December 7, 1950, N.C.P.I. 130, Section 5-1(b), shortly after the enactment of the Act of September 30, 1950, which provided:

> "*A warning should be given at any time prior to ninety days before the close of a rating period.* A warning given within ninety days preceding the close of the rating period serves to extend the rating period by the length of the unexpired portion of the warning period. On the other hand, whenever sustained unsatisfactory performance is clearly indicated at any time during the rating period, *corrective action should be taken administratively toward improving performance.* If sustained performance remains unsatisfactory, notwithstanding corrective actions taken and assistance given the employee, the employee should be demoted or separated on the basis of charges as outlined in Section 7 of this Instruction without regard to either rating or warning periods."

> Section 7-4 of the plan provided: "The single requirement of a penalty nature called for in the Performance Rating Act of 1950 is *'removal from the position in which unsatisfactory performance was rendered'*. An employee who, after a full and fair trial, demonstrates a sustained performance that is clearly unsatisfactory, should be promptly reassigned, demoted or separated from employment, without regard to whether or not a performance rating has been made." (Italics inserted)

Attention again is respectfully invited to the fact that in the case of the petitioner, there was no demonstration of "sustained performance that is clearly unsatisfactory", as he had received his work performance rating as "satisfactory", shortly before he was notified of his summary removal because of "unsatisfactory service", and, that this formal removal notification (Appendix, p. 27), referred to his work performance as "satisfactory", as aforesaid. A review of the record will emphasize the fact that William E. Ward, the petitioner, was removed from office on the broad charge of "unsatisfactory work performance"; that this charge was considered equivalent to a charge of "unsatisfactory services", and that no attempt was made by the administrative agency to differentiate in such interpretation until the present litigation was instituted.

The question as to the applicability of Section 6 of the Performance Rating Act of 1950, where a federal employee's removal was sought ostensibly because of his *alleged unsatisfactory work performance*, has never been decided, but should be determined, by this Honorable Court. It would appear that the Government should join in seeking a final determination of this important federal question by this Court.

The removal provision contained in this Act is the more recent enactment, and therefore the procedure therein provided should prevail.

Although the Performance Rating Act of 1950, did not specifically state that the safeguard provisions contained in Section 6 of this Act repealed or amended that part of the Lloyd-LaFollette Act of 1912, as may pertain to removal of federal employees for unsatisfactory services, Section 14 of the Act of September 30, 1950, provides as follows:

> "All laws or parts of laws inconsistent herewith are hereby repealed to the extent of such inconsistency."

But, irrespective of Section 14 of this Act, this Honorable Court frequently has pointed out that where two legislative acts are repugnant to, or in conflict with each other, the one *last passed*, being the latest expression of the legislature, *"will, although it contains no repealing clause, govern, control, or prevail*, so as to supercede or impliedly repeal the act", or any repugnant portion thereof. Henrietta Mining Co., etc. v. Gardner, 173 U.S. 123; U.S. v. Tynen, 11 Wall. 88.

In a separate opinion, in concurring with the Judgment below of the United States Court of Appeals, Circuit Judge Bazelon stated:

> "Since the Performance Rating Act is the more recent law, and affords additional protection to federal employees, I would be unwilling to infer that Congress intended such a result without express language to that effect."

However, upon considering the Petition for Rehearing In Banc, Judge Bazelon acted affirmatively thereon, in the divided action of the Court.

In conclusion, it is respectfully submitted that the Court below has decided a most important federal question of federal law which has not been, but should be, specifically settled by this Court; that the question involved is of vital importance to both the Government and

over several million federal employees, and should be decided by the court of last resort.

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12438

CHARLES S. THOMAS, Secretary of the Department of the Navy, APPELLANT,

v.

WILLIAM E. WARD, APPELLEE.

Appeal from the United States District Court for the District of Columbia

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Decided August 18, 1955

Mr. Samuel J. L'Hommedieu, Jr., Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, *Lewis Carroll* and *Joseph M. F. Ryan, Jr.*, Assistant United States Attorneys, were on the brief, for appellant.

Mr. Marcus Borchardt for appellee.

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: In 1951 plaintiff-appellee was a personnel officer in the Marine Corps Air Station at Cherry Point, North Carolina. Effective June 29, 1951, he was removed from his office pursuant to charges brought against him under the provisions of the Lloyd-LaFollette Act.[1] The charges alleged lack of professional knowledge and supervisory ability; poor personnel man-

[1] 5 U.S.C. § 652 (1952).

agement and public relations and acts of misconduct involving failure to carry out orders; disloyalty to his superiors and untruthfulness in official relations with other employees. Plaintiff-appellee was given an opportunity to reply to the charges and was granted a full hearing. The Commanding General of the Station, on reviewing the record, found the charges proved and ordered appellee's removal.

Appellee thereupon brought suit to have his removal from the classified civil service declared illegal, and for reinstatement. He raised two objections to his removal: (1) that it was effected through bad faith, fraud and official collusion, and (2) that it violated the Performance Rating Act of 1950.[2] As to the latter point—raised for the first time in the District Court—he claimed that his dismissal for "unsatisfactory services" was equivalent to dismissal on the ground of an "unsatisfactory performance" rating, and that he had not received the ninety-day warning of unsatisfactory performance required by the statute as a condition for receiving an unsatisfactory rating.[3] Appellee's contentions were rejected by the District Court. We reversed on appeal on the sole ground that the possible mandatory applicability of the Performance Rating Act of 1950 to all discharges for "cause" under 5 U.S.C. § 652 (1952)[4] raised an important issue which should not be decided by the courts without benefit of a prior ruling by the administrative agency involved

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[2] 64 STAT. 1098 (1950), 5 U.S.C. §§ 2001 *et seq.* (1952).

[3] 5 U.S.C. § 2005 (1952) provides in part: "No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable apportunity to demonstrate satisfactory performance."

[4] Or under 5 U.S.C. § 863 (1952), if the employee is a veterans preference eligible.

Ward v. *Anderson,* 93 U.S.App.D.C. 156, 208 F.2d 48 (1953).

Accordingly, on remand a ruling was made by the Department of the Navy on the "Question of Law Presented by U. S. Court of Appeals for Administrative Ruling by the Department of the Navy." This ruling determined—

> "1. That plaintiff was removed for such cause as will promote the efficiency of the classified civil service and for reasons given in writing.
>
> "2. That it was appropriate, proper, and a legal exercise of the authority of the Navy Department to remove the plaintiff by preferring charges of inefficiency under the Act of August 24, 1912 (5 U.S.C. 652).
>
> "3. The Performance Rating Act of 1950, section 6 (5 U.S.C. 2005) was not the appropriate law to invoke, nor is it applicable, because this Act was intended to be applied to an employee whom the department believes will improve his work performance or whose experience and services can be utilized by reassignment to another position. In other words, the Performance Rating Act should be applied when the agency or department contemplates continued employment of the individual rather than his immediate removal as soon as the procedures of the applicable removal laws (5 U.S.C. 652, id. 863) shall have been complied with.
>
> "4. When a department or agency elects to dismiss an employee on charges of inefficiency under the Act of August 24, 1912 (5 U.S.C. 652), instead of giving him an unsatisfactory performance rating and then preferring charges on the basis of such rating, if the charges or any of them, relate to a period covered by a satisfactory performance rating or a 'good' or better than 'good' efficiency rating (as some do in this case) such rating or ratings are only a part of the evidence to be considered in the determination under the Act of August 24, 1912.
>
> "5. While it is not a factor in this case, if a department or agency had given an employee an unsatisfactory performance rating which was either ap-

pealed to a statutory board of review and affirmed (5 U.S.C. 2006) or was not appealed and the unsatisfactory performance rating stood, the Civil Service Commission has allowed it to serve as a basis for removal from the position or from the Federal service at the option of the agency provided the fact, date, and finality of the unsatisfactory performance rating was set forth in a letter of charges prepared in compliance with the Veterans' Preference Act of 1944, as amended, (5 U.S.C. 863) or the Act of August 24, 1912 (5 U.S.C. 652) as the case may be."

Appellee then moved the District Court for a further ruling or for summary judgment. On July 12, 1954, the District Court adjudged appellee's removal from the classified civil service illegal—evidently on the ground that the Performance Rating Act had not been observed—and ordered him reinstated. The Secretary of the Navy now appeals.

As we view appellee's contention it comes down to this: that an employee in the classified civil service can be removed "for such cause as will promote the efficiency of such service" (5 U.S.C. § 652 (1952)), where the "cause" relates to the employee's performance of his official duties, only if he first has been rated unsatisfactory, and that a performance rating of satisfactory precludes dismissal for "cause" of that sort. Nothing in the applicable statutes, however, expressly provides for such a limitation on discharges for cause and nothing in them compels such a construction. Performance ratings were introduced [5]—long before the adoption of the Lloyd-La-Follette Act [6]—to measure employee performance for the purposes of promotion, retention priority or other ad-

[5] For a history of performance rating in the Federal Government see App. I to H. R. Rep. No. 2162, 81st Cong., 2d Sess., p. 13 (1950).

[6] *Supra*, n. 1.

justments in grade and pay. While an unsatisfactory performance rating may sometimes lead to dismissal for cause, it may also justify lesser personnel action such as transfer to a more suitable position[7] or demotion without severance of employment.[8] On the other hand, though an employee's ordinary over-all performance of duties throughout the rating period may be rated as satisfactory he may still be guilty of conduct in connection with the execution of his official duties, either in particular instances or in a particular aspect of his tasks, which would justify dismissal under 5 U.S.C. § 652 (1952) in the interest of promoting the efficiency of the service.

These matters were fully developed in the hearings on the bills[9] out of which grew the Performance Rating Act of 1950. President Mitchell of the Civil Service Commission testified that both presentation of charges and unsatisfactory ratings were available as means of dismissing an inefficient employee, but indicated that the proper method was to make "definite charges against him which he can appeal."[10] Commissioner Perkins, a former Sec-

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[7] Report to the House Committee on Post Office and Civil Service by the Subcommittee on the Federal Civil Service concerning Performance Rating Plans in the Federal Government, H. R. Rep. No. 2277, 83d Cong., 2d Sess., p. 10 (1954).

[8] Compare Jones v. Hobby, — U.S.App.D.C. —, — F. 2d — (decided May 26, 1955), slip opinion, p. 3.

[9] H. R. 7264 and H. R. 7824, 81st Cong., 2d Sess.

[10] Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 81st Cong., 2d Sess., on H. R. 7264 (A Bill to Authorize the Establishment of Methods for the Evaluation of the Performance of Work of Federal Employees, and for Other Purposes) and on H. R. 7824 (A Bill to Provide for the Administration of Performance-Rating Plans for Certain Officers and Employees of the Federal Government, and for Other Purposes), see p. 4 of Transcript of Hearings.

retary of Labor, testified to like effect.[11] The testimony also reveals the extreme difficulties suffered by an executive department in using the alternative method of discharging an inefficient employee through giving him an unsatisfactory rating.[12]

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[11] She testified:

"We believe that the responsibility for separating a man from the service should rest with the agency and that it should be done on charges, which are provided for in the civil service law, and that the sole reason for removing him is that he is incompetent and cannot do his work, and on trial has not done his work, and that he should be so charged, in writing, and given the usual 3 to 5 days to make his reply, and to point out that the information is incorrect, that is, that he did not do his work, and in what respect it is incorrect, and let his own agency decide whether it is or not." *Ibid.* at 9.

[12] Commissioner Perkins testified at p. 9:

"Now, one of the great complaints that has been made under the whole system is that you cannot fire inefficient people. You must have heard that a thousand times, sir. The reason for this famous case is that it is said to have taken a year and a quarter in the Navy is that a person who was given an unsatisfactory efficiency rating was presumed to be dismissed immediately on that rating.

"Instead of filing charges on her that she was inefficient, giving her 5 days to reply, and then if her reply was not satisfactory—and it probably could not have been—firing her, they gave her an 'unsatisfactory' rating.

"She then had the right to appeal that rating within the Navy, and the Navy has an elaborate grievance procedure.

"She appealed to one internal board and then to another internal board, and then to another internal board, and finally to this outside or supposedly impartial statutory board of appeals, and that procedure does take a year and a quarter.

"There was no question about it, that she was the

The administrative ruling made by the Navy Department in this case represents an attempt to balance and reconcile the considerations just discussed, based not only on theoretical fairness but on practical experience. We cannot say that the ruling is either unreasonable or outside the compass of the statutes involved. *Jones* v. *Hobby, supra*, n. 8. In the absence of compelling considerations to the contrary,[13] the agency's answer to the

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sort of person who ought to have been given charges of incompetency and inefficiency, the details of her incompetence specified in the charges, and then separated from the service. A week would have been sufficient to give her every possible justice."

And again she testified later in the hearings (Transcript, pp. 68-69):

"It is a very simple matter to follow the present law, which Congress passed many years ago, known as the Lloyd-LaFollette Act, in which a nonveteran employee is given his charges and allowed a reasonable time to reply, anywhere from 24 hours to 2 weeks, depending on the seriousness of the charge. His reply must be considered by the agency before he is removed. But the whole process, if the inefficiency is acute, and if he is really holding back the operation of the division in which he works, can be accomplished in about 2 weeks if the employee is not a veteran.

"One department made a complaint that they had a case where it took them 16 months to remove 1 inefficient employee. It was because they relied on the efficiency rating, and allowed that to be the subject of appeal in a grievance procedure which existed in the department, and it was finally appealed to the Efficiency Rating Board of Review."

[13] H. R. Rep. No. 2277, *supra*, n. 7, pp. 10-11, in its view of the functions of an unsatisfactory performance rating, seems to lean more in the direction urged by appellant. But even the Subcommittee says it "is not condemning the use of the provisions of either the Lloyd-LaFollette Act or section 14 of the Veterans' Preference Act to discharge undesirable workers. Furthermore, it recognizes the necessity for such an administrative authority as these acts provide."

legal question presented—the only question remaining in the case—should therefore be accepted.

Accordingly, the judgment of the District Court must be

Reversed and the cause remanded with directions to dismiss the complaint.

BAZELON, *Circuit Judge,* concurring in the result: The Performance Rating Act of 1950 requires that an employee be given a 90-day warning and opportunity to improve before he is rated unsatisfactory and removed.[1] Congress did not expressly limit or qualify these requirements. Under our holding today, however, the employing agency may, in dismissing an employee, avoid the requirements of the 1950 Act by proceeding under the 1912 Lloyd-LaFollette Act[2] which authorizes a more summary dismissal. Since the Performance Rating Act is the more recent law, and affords additional protection to federal employees, I would be unwilling to infer that Congress intended such a result without express language to that effect. But I think this effect is approved by our recent decision, in *Jones* v. *Hobby,*[3] that the Performance Rating Act does "not directly or by implication modify or supersede authority to demote personnel on charges" under pre-existing law and regulations. Though *Jones* involved a demotion, I find no basis for giving the Act a different effect with respect to removals. For that reason, I concur in the result here.

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[1] 64 STAT. 1099 (1950), 5 U.S.C. § 2005 (1952).

[2] 37 STAT. 555 (1912), as amended, 62 STAT. 355 (1948), 5 U.S.C. § 652 (1952).

[3] — U.S.App.D.C. —, — F.2d — (May 26, 1955).

Filed Sep 23 1955 Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 12,438

April Term, 1955

Charles S. Thomas, Secretary of the Navy, Appellant,

v.

William E. Ward, Appellee

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, in Chambers.

Order

Upon consideration of appellee's petition for a rehearing in banc in the above entitled case, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: September 23 1955

Circuit Judges Prettyman and Bastian did not participate in the foregoing order.

Circuit Judge Bazelon would grant the petition for rehearing in banc.

IN THE UNITED STATES DISTRICT COURT
For the District of Columbia

William E. Ward, Plaintiff

v.

Robert B. Anderson, Secretary of the Navy, Defendant

Civil Action No. 122-52

Judgment On Mandate *

William E. Ward, plaintiff in the above entitled cause, having appealed to the United States Court of Appeals for the District of Columbia Circuit from the judgment entered in this cause on April 24, 1952, and from the judgment entered herein on July 5, 1952, denying plaintiff's Motion to Set Aside the Judgment of April 24, 1952, and the United States Court of Appeals for the District of Columbia Circuit having issued its mandate dated Febraary 19, 1954, wherein it is Ordered, Adjudged and Decreed that said judgment be reversed and hte case remanded to this Court for such further consideration as set forth therein.

NOW, THEREFORE, it is this 30th day of April, 1954, ORDERED, ADJUDGED and DECREED as follows:

1. That the judgment of this Court entered on April 24, 1952, be and the same hereby is reversed.

2. That this cause be and hereby is remanded to Robert B. Anderson, as Secretary of the Navy, for him to give prompt consideration to the matter of applicability of the provisions of 5 U.S.C., Section 2005 herein, in accordance with the mandate of the United States Court of

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* Judgment on Mandate, in previous case of Ward v. Anderson, 93 U.S. App. D.C. 156, 28 F (2nd) 48, wherein report of Secretary of the Navy was sought as to applicability of 5 U.S.C. § 2005 herein.

Appeals for the District of Columbia Circuit and the opinion of said Court herein.

3. That the said Robert B. Anderson, as Secretary of the Navy, promptly submit to this Court a report on his final determination as to the matter of applicability of 5 U.S.C., Section 2005 herein.

4. That this Court retain jurisdiction of this cause pending further proceedings as may be required herein.

/s/ JAMES W. MORRIS

United States District Judge,
United States District Court
For the District of Columbia

IN THE UNITED STATES DISTRICT COURT

For the District of Columbia

William E. Ward, Plaintiff

v.

Charles S. Thomas, Secretary of the Navy, Defendant

Civil Action No. 122-52

Order For Summary Judgment

Upon consideration of Motion for further ruling or for Order for Summary Judgment herein, it appearing to the Court that the Secretary of the Navy had filed a report in the matter of applicability of the provisions of 5 U.S.C., Section 2005, pursuant to Judgment on Mandate herein, and it further appearing, after argument of counsel that plaintiff was illegally removed from his position in the classified service, for "unsatisfactory services" notwithstanding the fact that his performance rating was "satisfactory" prior to his removal, it is by the Court this 12 day of July, 1954,

ORDERED, ADJUDGED AND DECREED that the Secretary of the Navy be and he hereby is directed to restore the plaintiff William E. Ward to the classified civil service with a rating of GS-11, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the said William E. Ward be and he is entitled to all rights, privileges, and emoluments of said office and position during the interim from his actual removal from office to the date of his restoration to classified civil service.

(Signed) Alexander Holtzoff
Judge

STANDARD FORM 50
OCTOBER 1949
PROMULGATED BY
U. S. CIVIL SERVICE COMMISSION
CHAPTER 54, FEDERAL PERSONNEL MANUAL

NAVY DEPARTMENT

NOTIFICATION OF PERSONNEL ACTION

1. NAME (MR.—MRS.—MISS.—GIVE GIVEN NAME, INITIAL(S), AND SURNAME)	2. DATE OF BIRTH	3. JOURNAL OR ACTION NO.	4. DATE
Mr. William E. Ward	10-6-04		6-26-51

This is to notify you of the following action affecting your employment:

5. NATURE OF ACTION (USE STANDARD TERMINOLOGY)	6. EFFECTIVE DATE	7. CIVIL SERVICE OR OTHER LEGAL AUTHORITY
Removal	6-29-51	

FROM		TO
Personnel Officer 08-201-11, $5800.00 per annum Industrial Relations Department Employment Section 65-1 Marine Corps Air Station Cherry Point, N. C.	8. POSITION TITLE 9. SERVICE, SERIES, GRADE, SALARY 10. ORGANIZATIONAL DESIGNATIONS 11. HEADQUARTERS	
[X] FIELD [ ] DEPARTMENTAL	12. FIELD OR DEPT'L	[ ] FIELD [ ] DEPARTMENTAL

13. VETERAN'S PREFERENCE						14. POSITION CLASSIFICATION ACTION				
NONE	5PTS	OTHER	5-PT.	10-POINT DISAB.	10-POINT OTHER	NEW	VICE	I.A.	REAL.	
X										PD #4416 AWOO Eor 7-11-50

15. SEX	16. RACE	17. APPROPRIATION	18. SUBJECT TO C. S. RETIREMENT ACT (YES—NO)	19. DATE OF APPOINTMENT AFFIDAVITS (ACCESSIONS ONLY)	20. LEGAL RESIDENCE
M	W	FROM: Aircraft & Facilities, Navy 1951 TO:	Yes		[ ] CLAIMED [ ] PROVED STATE:

21. REMARKS: This action is subject to all applicable laws, rules, and regulations and may be subject to investigation and approval by the United States Civil Service Commission. The action may be corrected or canceled if not in accordance with all requirements.
Reason for Removal: Unsatisfactory Services.

Annual Leave: 24 days & 7 hours. 7-2-51 through 7 hours 8-6-51.

Competitive Status.

Performance Rating: Satisfactory.

ENTRANCE EFFICIENCY RATING

R. C. KOONCE
Colonel, U. S. Marine Corps
Acting (Commanding)
22. SIGNATURE OR OTHER AUTHENTICATION

1. EMPLOYEE COPY

U. S. GOVERNMENT PRINTING OFFICE 16 63197

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	17

CITATIONS

Cases:	
Fogarty v. *United States*, 340 U. S. 8	14
United States v. *Henning*, 344 U. S. 66	15
United States v. *Mine Workers*, 330 U. S. 258	14
Statutes:	
Act of August 23, 1912, Sec. 4, 37 Stat. 413	9
Classification Act of 1923, Sec. 9, 42 Stat. 1490–1491	9
Classification Act of October 28, 1949, 63 Stat. 954:	
Sec. 701 (5 U. S. C. 1121)	8
Title IX	9
Lloyd-LaFollette Act of 1912, Sec. 6, 37 Stat. 555, as amended, 5 U. S. C. 652	3
Performance Rating Act of 1950, 64 Stat. 1098:	
Sec. 3 (5 U. S. C. 2002)	8, 15
Sec. 5 (5 U. S. C. 2004)	8
Sec. 6 (5 U. S. C. 2005)	2, 7, 8
Sec. 8 (5 U. S. C. 2007)	15
Sec 9 (a) (5 U. S. C. 1121)	8
Veterans' Preference Act, Sec. 14, 58 Stat. 390, as amended, 5 U. S. C. 863	12

371098—56——1

Miscellaneous:	Page
69th Annual Report of the United States Civil Service Commission (1951–1952), p. 71	16
Civil Service Commission Departmental Circular No. 634, July 21, 1950, p. 2	11
5 C. F. R. 9.102 (1949 ed.)	11, 17
5 C. F. R. 9.102 (1955 Supp.)	17
64 Cong. Rec. 5110	10
Federal Personnel Council, Employee Development Committee, *Report on Performance Evaluation in the Federal Service* (April 1953), p. 6	16
Federal Personnel Manual, United States Civil Service Commission:	
P. E1–15	11
P. E1–25	11
P. P–4–3	17
P. S 1–14	11
Pp. S 1–20—S 1–23	11
Hearings before the House Committee on Post Office and Civil Service, 81st Cong., 2d Sess., on H. R. 7264 and on H. R. 7824:	
P. 4	12
P. 9	12
P. 34	13
Pp. 68–69	12
H. Rept. 2162, 81st Cong., 2d Sess.:	
P. 2	11
Pp. 13–16	9
H. Rept. 2277, 83rd Cong., 2d Sess., dated July 19, 1954	13
P. 10	14
P. 11	14
Navy Department NCPI 130, Sec. 7–4	15
S. Rept. 486, 67th Cong., 2d Sess	10
S. Rept. 2265, 81st Cong., 2d Sess., pp. 5–8	9

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 574

WILLIAM E. WARD, PETITIONER

v.

CHARLES S. THOMAS, SECRETARY OF THE DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 15–22) is reported at 225 F. 2d 953.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1955 (Pet. App. 15). A petition for a rehearing *en banc* was denied on September 23, 1955 (Pet. App. 23). The petition

for a writ of certiorari was filed on December 16, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Petitioner was removed from his position in the classified civil service for causes related to the conduct of his official duties. The procedures followed fully conformed to the provisions of the Lloyd-LaFollette Act of 1912.

The question presented is whether the Performance Rating Act of 1950 precludes removal for improper conduct of official duties when the employee's performance rating, based upon his over-all performance during the relevant rating period, was "satisfactory."

STATUTES INVOLVED

Section 6 of the Performance Rating Act of 1950, 64 Stat. 1099, 5 U. S. C. 2005, provides in relevant part as follows:

> Each performance-rating plan shall provide for rating representing at least * * * (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; * * *. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

Section 6 of the Lloyd-LaFollette Act of 1912, 37 Stat. 555, as amended, 5 U. S. C. 652, provides in pertinent part:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. * * *

STATEMENT

Petitioner, a non-veteran, held a position in the classified civil service as a Personnel Officer at the Marine Corps Air Station, Cherry Point, North Carolina (R. 1). On May 11, 1951, he was served with a written notice of charges, looking to his removal from his position, pursuant to the provisions of the Lloyd-LaFollette Act, *supra*, this page (R. 10–13). On May 31, 1951, this notice was supplemented by the specification of over 40 instances reflecting the lack of professional knowledge and ability; the lack of supervisory ability; poor personnel management; per-

sonal disloyalty; the making of false statements, and the failure to carry out instructions (R. 18–29).

Petitioner took advantage of the reasonable opportunity afforded him to answer the charges and, on June 15 and 18, 1951, received a hearing (R. 4, 13–17, 30–40). On June 26, 1951, the Acting Commanding General of the Air Station advised petitioner in writing that the charges were deemed to have been proven and that he was being removed for unsatisfactory service, effective June 29, 1951 (R. 41–42). On June 30, 1951, petitioner appealed from this determination to the Under Secretary of the Navy (R. 44). On September 29, 1951, the Under Secretary, finding the charge of unsatisfactory service to be clearly established by the record, denied the appeal (R. 44–45).

On January 9, 1952, petitioner filed this action in the District Court, seeking an order declaring his removal illegal and directing his reinstatement R. 1–9). The complaint alleged (1) that the removal had been effected through fraud, bad faith and collusion on the part of certain supervisory officials and (2) that, since petitioner had a "satisfactory" performance rating, he could not be removed without the 90-day warning which Section 6 of the Performance Rating Act, *supra*, p. 2, requires as a condition to a performance rating of "unsatisfactory" (R. 5–7).

On motion of respondent, the District Court (Morris, J.) dismissed the complaint (R. 45–46).

The Court of Appeals reversed (208 F. 2d 48). With respect to the allegations of fraud, collusion and bad faith, the court agreed with the view of the District Court that they were insufficient to warrant judicial review on the merits of the administrative action (208 F. 2d at 49). Insofar as the alleged violation of the Performance Rating Act was concerned, however, the Court of Appeals ruled that the District Court should not have passed upon the applicability of the Act without a prior determination by the administrative agency involved (208 F. 2d at 50). Accordingly, the cause was remanded with instructions to provide adequate opportunity for an administrative determination on this question (*ibid.*).

In compliance with an order of the District Court following the remand, the Department of the Navy submitted a report on June 14, 1954, in which it concluded that petitioner's removal could be effected under the Lloyd-LaFollette Act without observance of the provisions of the Performance Rating Act (R. 47–49). On July 12, 1955, the District Court (Holtzoff, J.), disagreeing with this conclusion, granted summary judgment to petitioner and directed his restoration to his position in the classified civil service (R. 49–50).

On August 18, 1955, the Court of Appeals reversed and remanded with instructions to dismiss the complaint (Pet. App. 15–22). The court observed (1) that neither the applicable

statutes nor the legislative history of the 1950 Act supported petitioner's position that a "satisfactory" performance rating precludes a dismissal for a cause which relates to the employee's performance of his official duties; (2) that an "unsatisfactory" performance rating may justify lesser personnel action than removal; and (3) that, by the same token, a "satisfactory" performance rating based upon the employee's overall performance during the rating period does not preclude the possibility of his being guilty of conduct in the execution of his duties, either in particular instances or in a particular aspect of his position, which would justify removal under the Lloyd-LaFollette Act (Pet. App. 18–20). The court then concluded (Pet. App. 21):

> The administrative ruling made by the Navy Department in this case represents an attempt to balance and reconcile [these considerations], based not only on theoretical fairness but on practical experience. We cannot say that the ruling is either unreasonable or outside the compass of the statutes involved.

On September 23, 1955, a petition for a rehearing *en banc* was denied (Pet. App. 23).

ARGUMENT

The removal of petitioner from his position in the classified civil service was indisputably effected in full compliance with the requirements

of the Lloyd-LaFollette Act.[1] The formal charges, and the particulars supplied at petitioner's request, detailed numerous, specific instances of inadequate performance and misconduct, and petitioner was afforded sufficient opportunity to file a written answer thereto. He did so. Thereafter, he received a full hearing, followed by review by the Under Secretary of the Navy. Since, as the Court of Appeals correctly held, nothing in the Performance Rating Act of 1950 or its legislative history dictates the conclusion that this statute was intended to limit discharges for cause under the Lloyd-LaFollette Act, petitioner has no legitimate basis for complaint. Accordingly, further review is not warranted.

1. As the Court of Appeals observed (Pet. App. 18), Section 6 of the Performance Rating Act, upon which petitioner relies, does not expressly limit discharges for cause under the Lloyd-LaFollette Act. The section provides simply that no employee may be given an "unsatisfactory" performance rating, which shall serve as *a* basis

[1] Petitioner's assertion (Pet. 7) that he was not removed under the Lloyd-LaFollette Act is frivolous. Contrary to his seeming belief, there is, of course, no requirement that either the written notice of charges or the notification of removal contain a specific reference to the Act. And, while the notice of charges may have been couched in terms of petitioner's "unsatisfactory service" (R. 10), there is no room for doubt that the charges, if true, constituted "such cause as will promote the efficiency of [the classified civil] service" within the meaning of the Act.

371098—56——2

for removal, without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance. What petitioner seeks is to read into this provision an additional stipulation that a "satisfactory" performance rating absolutely precludes discharge for any cause which relates to the employee's execution of his official duties.

If Congress had proposed, by Section 6 of the Performance Rating Act, to compel a basic change in the requirements of the Lloyd-LaFollette Act and in the procedures long followed in its administration, it assuredly would have employed language more appropriate to that end.[2] This conclusion is inescapable in light of the history of performance ratings in the Federal Government (a history with which Congress was thoroughly

[2] While petitioner invokes solely Section 6 of the Performance Rating Act, it may be noted in passing that nothing in any of the other sections lends support to his position. Indeed, when the Act is read as a whole, it is seen that, unlike the Lloyd-LaFollette Act, it is not addressed to the removal of employees in the classified civil service. Section 3 (5 U. S. C. 2002), for example, states that the performance rating plans to be established by each department are "[f]or the purpose of recognizing the merits of officers and employees, and their contributions to efficiency and economy in the Federal service." Section 5 (5 U. S. C. 2004) stipulates that each plan shall provide, *inter alia*, for the use of appraisals to improve the effectiveness of employee performance and for strengthening supervisor-employee relationships. And Section 9 (a) amended Section 701 of the Classification Act of 1949, 5 U. S. C. 1121, to condition step-increases in compensation upon a current performance rating of "satisfactory" or better.

familiar, as is evident from the relevant committee reports) [3] and the legislative history of the Performance Rating Act.

Neither performance ratings, nor personnel action based thereon, were innovations of the Performance Rating Act. Indeed, the first Congressional action in this sphere preceded by one day the Lloyd-LaFollette Act. By Section 4 of the Act of August 23, 1912, 37 Stat. 413, the Civil Service Commission was directed to establish a system of efficiency ratings for the classified service within the District of Columbia. The Act declared that the system was to provide minimum ratings of efficiency for the purposes of promotion, demotion and *dismissal for inefficiency.*

By Section 9 of the Classification Act of 1923, 42 Stat. 1490–1491, the creation of a Personnel Classification Board was authorized, for the purpose of reviewing and revising uniform systems. The Act further provided that the Board was to establish rating levels for salary advancements within grade, for continuation of existing rates of compensation, for reduction in pay within grade and for *dismissal.*

The 1923 Act, as amended, was repealed by Title IX of the Classification Act of October 28, 1949, 63 Stat. 970. The latter Act called for the establishment by the Civil Service Commission of uniform systems of efficiency ratings for offi-

[3] See S. Rept. 2265, 81st Cong., 2d Sess., pp. 5–8; H. Rept. 2162, 81st Cong., 2d Sess., pp. 13–16.

cers and employees in the classes and grades provided therein. Like the 1923 Act, it specified that the systems should set forth degrees of efficiency constituting grounds, *inter alia,* for changes in the rate of the employee's compensation, as well as for removal from the position occupied or *dismissal* from the service.

While each of these statutes, in common with the Performance Rating Act, thus provided that an unsatisfactory efficiency rating was to serve as *a* basis for removal, none of them contained any restriction upon the removal of an employee under the Lloyd-LaFollette Act for inefficiency or otherwise unsatisfactory service. And the discussion on the floor of the Senate in connection with the Classification Act of 1923 clearly indicates that no such restriction was intended. Asked specifically whether it would have an effect upon the dismissal provisions of the Lloyd-LaFollette Act, Senator Sterling, the author of the committee report on the bill,[4] responded in the negative (64 Cong. Rec. 5110).

Administratively, the Civil Service Commission had consistently taken the position for many years, both in regulations and in accompanying instructions, that compliance with the procedural requirements of the Lloyd-LaFollette Act was the single condition precedent to removal

[4] S. Rept. 486, 67th Cong., 2d Sess.

of a non-veteran for inefficiency.[5] It was also the Commission which instituted (as of November 24, 1947) the requirement of a warning period of from three to six months prior to the *rating* of an employee as "unsatisfactory." See *Federal Personnel Manual*, p. E 1–15. This practice, in relation to rating, was noted in the report of the House Committee on Post Office and Civil Service in connection with the bill which became the Performance Rating Act, the committee stating its belief that the requirement of a warning should be incorporated into the Act. See H. Rept. 2162, 81st Cong., 2d Sess., p. 2.

The legislative hearings similarly show that there was no purpose to alter the requirements of the Lloyd-LaFollette Act or the procedures traditionally followed under that statute. As pointed out by the court below (Pet. App. 19),

[5] See *e. g.*, 5 C. F. R. 9.102 (1949 ed.) and *Federal Personnel Manual*, pp. S 1–14, S 1–20—1–23. Section 9.102, the regulation dealing with the procedure to be followed in removing permanent and indefinite employees, was grounded upon the provisions of the Lloyd-LaFollette Act. The instructions in the *Federal Personnel Manual* were to the effect that discharges for inefficiency were governed by Section 9.102 alone. And that portion of the Manual (p. E1–25) concerned with efficiency ratings stipulated merely that an employee whose rating was "unsatisfactory" was not to be permitted to remain in his position but was to be separated, reassigned or demoted. See, also, Civil Service Commission Departmental Circular No. 634, July 21, 1950, p. 2.

As noted in point 3, *infra*, pp. 15–17, the Commission has taken the same position since passage of the Performance Rating Act.

Chairman Mitchell of the Civil Service Commission indicated that while both the presentation of charges and the granting of an "unsatisfactory" rating were available as means of dismissing an inefficient employee, the former was the appropriate method.[6] This view was concurred in by Commissioner Perkins, who elaborated upon the administrative difficulties attaching to the use of an "unsatisfactory" rating as the basis for dismissal.[7] Additionally, the President of the National Federation of Federal Employees, in objecting to what he deemed the "improper" use of efficiency rating systems to remove employees, stated his understanding that "there is a means provided, and has been in existence since the

[6] See Hearings before the House Committee on Post Office and Civil Service, 81st Cong., 2d Sess., on H. R. 7264 (A Bill to Authorize the Establishment of Methods for the Evaluation of the Performance of Work of Federal Employees, and For Other Purposes), and on H. R. 7824 (A Bill to Provide for the Administration of Performance-Rating Plans for Certain Officers and Employees of the Federal Government, and For Other Purposes), p. 4.

[7] *Id.*, pp 9, 68–69. As Commissioner Perkins noted, past experience revealed that removal action based upon the employee's efficiency rating, rather than upon the preferment of charges, frequently resulted in appreciable delays in the separation of inefficient personnel. Presumably, in the case of veterans the delays were of even greater magnitude by reason of the requirement in Section 14 of the Veterans Preference Act, 58 Stat. 390, as amended, 5 U. S. C. 863, that the preference eligible be given thirty days advance notice of proposed discharge, as well as a hearing before the Civil Service Commission on review of an adverse agency determination.

[Lloyd-LaFollette Act], whereby inefficiency or incompetency can be made the subject of the preferment of charges and the employee be required to answer those charges, to show cause why he or she should not be demoted or dismissed because of lack of competency or lack of efficiency."[8]

The short of the matter is that, for present purposes, the Performance Rating Act changed existing law in but a single respect, and then only by the codification of an established administrative practice confined to the rating system. In these circumstances, it is difficult to see how it can seriously be suggested that, without saying so, Congress intended the Performance Rating Act to have much more sweeping consequences, *i. e.*, to operate as a drastic limitation upon the long-exercised and hitherto unchallenged power of the Executive to proceed under the Lloyd-LaFollette Act in removing employees because of demonstrable, unsatisfactory performance of their duties.

2. Ignoring the contemporaneous legislative history, petitioner attempts to find support in subsequent history, *i. e.*, in a report of the House Subcommittee on the Federal Civil Service dealing with the general subject of performance ratings, written almost four years after passage of the Performance Rating Act.[9] Thus, he relies on certain statements in the report purportedly

[8] *Id.*, p. 34.

[9] H. Rept. 2277, 83d Cong., 2d Sess., dated July 19, 1954.

evincing the Subcommittee's belief that the Performance Rating Act is to be applied where removal is based upon job performance (Pet., pp. 8–10). This reliance is, however, misplaced. For one thing, the Subcommittee made it equally clear that it was not "condemning the use of the provisions of either the Lloyd-LaFollette Act or section 14 of the Veterans' Preference Act to discharge undesirable workers," and that it "recognize[d] the necessity for just such an administrative authority as these acts provide."[10] Moreover, as this Court noted in *Fogarty* v. *United States,* 340 U. S. 8, 13–14, subsequent legislative events cannot be invoked to supplant the contemporaneous intent of the Congress which enacted the particular legislation under consideration. See, also, *United States* v. *Mine Workers,* 330 U. S. 258, 281–282.[11]

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[10] *Id.*, p. 11.

[11] One of the salutary reasons for this rule is seen from an examination into the composition of the Subcommittee which rendered the report upon which petitioner relies. Four of the seven members (Messrs. Harden, Cole, Cretella, and Moss) were not on the Committee on Post Office and Civil Service when the hearings were held on the Performance Rating Act. In fact, Messrs. Cretella and Moss were not then members of the Congress.

It is also noteworthy that the Subcommittee was of the erroneous impression that, on the prior appeal, the court below had held Section 6 of the Performance Rating Act to be applicable to petitioner's removal. H. Rept. 2277, 83d Cong., 2d Sess., p. 10. This may well have influenced the views expressed in the report.

3. The administrative interpretation of the 1950 legislation, as well as the Commission's interpretation of the pertinent earlier statutes (see discussion, *supra,* pp. 10–11), supports the conclusion reached by the Court of Appeals. Cf. *United States* v. *Henning,* 344 U. S. 66, 75.

By Section 8 of the Performance Rating Act (5 U. S. C. 2007), the Commission was authorized to issue such regulations as might be necessary in the administration of the Act. The Commission was also directed to inspect and supervise the administration of the performance rating plans called for by Section 3 (5 U. S. C. 2002), and to revoke those which did not meet the requirements of the Act and the regulations promulgated thereunder.

Acting pursuant to this authority, the Commission approved the performance rating plan of the Department of the Navy, published on December 7, 1950. NCPI 130. Section 7–4 of this plan provided that an "employee who, after a full and fair trial, demonstrates a sustained performance that is clearly unsatisfactory, should be promptly reassigned, demoted or separated from employment, without regard to whether or not a performance rating has been made." The section added that "[d]emotion and separation will be made by the preferment of charges, in which specific instances of unsatisfactory work

performance shall be cited" and that "[s]uch charges may be preferred at any time."

The same view of the Performance Rating Act is expressed in the *Report on Performance Evaluation in the Federal Service,* issued in April 1953 by the Employee Development Committee of the Federal Personnel Council.[12] The report notes that (p. 6):

> * * * The Unsatisfactory rating provides a basis to be used as of a particular date (not less often than every 12 or 18 months) for separating an employee whose performance is below the minimum acceptable standards. Such a rating may be given only after a specific 90-day warning and is subject to two appeal procedures * * *. However, under the regulations of the Civil Service Commission, action may be initiated at any time to effect removals for unsatisfactory performance without the formality of an Unsatisfactory rating, and in such cases the procedures require no warning and provide no right of appeal for non-veteran employees other than that

[12] The function of the Federal Personnel Council is to study personnel policies and to make recommendations to the Civil Service Commission and to other agencies. Its members include the personnel directors of each federal agency, and representatives of the Civil Service Commission and of the Bureau of the Budget. See *69th Annual Report of the United States Civil Service Commission* (1951–52), p. 71.

which may be available under the agency's grievance procedure.[13]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1956.

[13] The regulation referred to by the Council undoubtedly was 5 C. F. R. 9.102, see n. 5, *supra*, p. 11. While, since 1950, Section 9.102 has been amended in minor respects, it still grounds removal of non-veterans for inefficiency solely upon compliance with the provisions of the Lloyd-LaFollette Act. See 5 C. F. R. (1955 Supp.) 9.102. And, while the *Federal Personnel Manual* now calls for use of performance ratings as a *guide* to personnel actions such as salary increases, promotion, demotion, removal and reduction-in-force (see p. P–4–3), it does not suggest that removal may not be effected in the absence of an "unsatisfactory" performance rating.

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Petitioner

vs.

CHARLES S. THOMAS, Secretary of the Department of the Navy,
Respondent

PETITIONER'S REPLY BRIEF TO BRIEF FOR RESPONDENT

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In the Brief for Respondent in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein, gross inaccuracies appear, as to both the facts and the law, which require a reply.

First, the "QUESTION PRESENTED" therein is erroneously set forth. PETITIONER WAS NOT REMOVED FOR "IMPROPER CONDUCT", as alleged by respondent (Resp. Brief, p. 2). He was removed for "UNSATISFACTORY SERVICE",—as he was orally told on May 7, 1951, and as he was informed at all times thereafter, including the formal "Notification of Personnel Action", a photostat of which appears on page 27 of petition herein.

Next, the respondent endeavors to convey the false impression that petitioner contends that Section 6 of the

Act of September 30, 1950, referred to as the Performance Rating Act of 1950, 5 U.S.C. § 2005, "was intended to limit discharges *for cause* under the Lloyd-LaFollette Act", 5 U.S.C. 652, (Resp. Brief, p. 7). The petitioner, at no time, raised such a contention. Section 6 of the Act of September 30, 1950, has reference to *job performance* and not *"misconduct"* or *"discharges for cause"*. It provides for a procedure to be complied with in the removal of a government employee for "unsatisfactory service" or job performance.

At the time of the enactment of this Act, federal employees were being removed from office on any ground whatsoever, under regulations promulgated under the Lloyd-LaFollette Act of 1912.

However, at the hearings, pertaining to the 1950 legislation, representatives of various government employee organizations, appeared, and urged that where job performance was involved, federal career workers should be protected against misuse of laws or administrative regulations, then in effect, governing personnel.

The legislative history of the Act of September 30, 1950, reveals that Chairman Mitchell and Commissioner Perkins of the Civil Service Commission considered removal regulations then in effect, adequate in "protecting employees against arbitrary, capricious or unjust discharge", for misconduct, inefficiency or for any other reason. But Congress thought otherwise, and overruled their objections, and the removal provision in question thus *was incorporated in the law.*

There can be no question that Congress intended to prescribe a procedure in the new law, governing the removal of federal employees where job performance was involved.

To offset this construction of the law, the respondent endeavors to suggest (Resp. Brief, p. 14) that although this may be the construction of the law by a subsequent

Congressional Committee, such later construction "cannot be invoked to supplant the contemporaneous intent of the Congress which enacted the particular legislation under consideration". There is no such attempt made, whatsoever. THE INTENT OF THE CONGRESS THAT ENACTED THE REMOVAL PROVISION OF SECTION 6 OF THE ACT OF SEPTEMBER 30, 1950, WAS IDENTICALLY THE SAME AS THE SUBSEQUENT CONGRESS CONSTRUED IT TO BE.

As stated in the case of United States v. Henning, 344 U.S. 66, cited by respondent,

> "The conclusion is irresistible that . . . Congress said what it meant and meant what it said."

Petitioner, in his brief, has set forth specific important "Reasons for Granting the Writ". Nowhere in respondent's brief has exception been taken to such reasons, or any of them, because the respondent unquestionably recognizes their merit,—that questions of grave and vital importance are involved, affecting several million federal employees; that the issue involved raises a substantial question of law for the first time; that a final determination should be made by this Honorable Court as to the applicability of Section 6 of the Act of September 30, 1950, where a federal employee's removal was sought because of his alleged *unsatisfactory work performance and not for "misconduct"*.

It is respectfully submitted that a Writ of Certiorari should be granted herein.

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